STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
OWENS, P.J., AND HOLBROOK, JR., AND GAGE, J.J.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

-vs- **Supreme Court No. 121050**

DEAN MADISON MARTIN

Defendant-Appellee.
_____/

APPELLEE'S BRIEF
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellee agrees with Plaintiff-Appellant's Statement of Jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS PROPERLY REVERSE MR. MARTIN'S CONVICTIONS FOR SOLICITATION TO COMMIT FIRST DEGREE CRIMINAL SEXUAL CONDUCT, BECAUSE THE BEHAVIOR FOR WHICH HE WAS CONVICTED DOES NOT SATISFY THE STATUTORY DEFINITION OF THAT OFFENSE?

Court of Appeals answers, **"Yes".**

Defendant-Appellee answers, **"Yes".**

COUNTER STATEMENT OF FACTS

Defendant-Appellee Dean Madison Martin pled guilty, as charged, to one count of child sexually abusive activity [MCL 750.145c(2)]; three counts of solicitation to commit first degree criminal sexual conduct [MCL 750.157b(3)(a); MCL 750.520b(1)(a)]; and four counts of distribution of child sexually abusive material [MCL 750.145c(3)], on December 1, 1999, in Oakland County Circuit Court, before the Honorable Denise Langford Morris.

On December 20, 1999, Mr. Martin was sentenced to 5 to 20 years' imprisonment for child sexually abusive activity; 40 to 60 months for solicitation to commit first degree criminal sexual conduct; and 4 to 7 years for distribution of child sexually abusive material.

Appellate Proceedings

Mr. Martin sought leave to appeal his convictions to the Court of Appeals. On December 28, 2001, the Court of Appeals issued an unpublished per curiam Opinion, affirming Mr. Martin's conviction for child sexually abusive activity and distribution of child sexually abusive material, but reversing his convictions for solicitation to commit first degree criminal sexual conduct. The reversal of the solicitation convictions was based on the Court of Appeals' determination that "there was no evidence the defendant solicited anyone to do a criminal act." [23a]. The Court concluded that the factual scenario presented in instant case is "nearly identical" to that in *People v Thousand*, 465 Mich 149; 618 NW2d 772 (2001), where this Court dismissed solicitation charges because no crime could have resulted from the defendant's efforts to solicit an undercover police officer posing as a child to engage in sexual activity. [23a].

The prosecution sought rehearing on the reversal of the solicitation convictions, which was denied on February 12, 2002. [25a]. The prosecution sought leave to appeal that decision to

this Honorable Court, and Mr. Martin submitted a response to that application. On July 22, 2002, the Court granted the prosecution's application. [26a].

Trial Court Proceedings

The charges arose after police placed an advertisement over the internet, offering child prostitutes, to which Mr. Martin responded. From September 17, 1998 until he was arrested on November 6, 1998, Mr. Martin communicated with an officer posing as the "pimp," and as a fictitious girl dubbed "Sandi." Most of the communication occurred via email, although there was some telephone and regular mail correspondence. The charges specifically alleged that Mr. Martin sent pictures depicting erotic child nudity over the internet; attempted to arrange a sexual liaison with the nonexistent child; and attempted to take sexual photographs and/or videotape recordings of that same illusory child.

Mr. Martin admitted to committing the charged acts, but maintained that he never would have actually engaged in sexual activity with the child. He responded that he was entrapped by police, and also that the offense was legally impossible since the alleged victim did not exist. The defense filed a Motion to Quash based on legal impossibility, since "Sandi," the alleged victim, did not exist. A hearing was held on August 11, 1999, and the motion was denied in an Order issued August 25, 1999. [1b].

The defense also filed a motion to dismiss based on entrapment, and a lengthy hearing was held on September 30, 1999.

At the entrapment hearing, Officer Michael DiMatteo testified that, as part of a criminal investigation originating in California, he posed as Mike West and published an advertisement on the internet offering "very young escorts." The ad was sent to registrants of an America On Line chat room where child pornography was being traded. [38a-39a]. Officer demote

recounted the communications he had with Mr. Martin from September 17, 1998 until Mr. Martin was arrested on November 6, 1998.

On September 17, 1998, Officer DiMatteo received a response from an individual later to be identified as Mr. Martin, indicating that he was interested and wanted details. [43a-44a]. When DiMatteo asked for Mr. Martin's profile and a description of his interests, Mr. Martin responded that he wanted to have sex with a preteen girl; and that this was a desire he had had for many years and felt he could repress it no longer. [63a]. When DiMatteo asked if Mr. Martin was the police, Mr. Martin sent three different transmissions depicting nude girls involved with sexual activity, as an indication of his sincerity. [55a, 58a, 61a].

Later that same day, demote sent Mr. Martin photographs of girls who were purportedly available for sexual activity in exchange for money. Included among these was a nine-year-old girl he called "Sandi," in whom Mr. Martin expressed interest. [60a, 68a-69a, 74a-75a]. He commended Mr. Martin's selection, indicating that he would have made the same choice. [77a]. He told Mr. Martin he and "Sandi" would be in Michigan in November, so "be sure to eat your Wheaties and start saving your money if you are interested." [71a].

On September 23, 1998, DiMatteo offered to facilitate email communication between Mr. Martin and "Sandi," and he set up a screen name for "Sandi" entitled "Sandi4funn." [78a, 80a]. During this email conversation, DiMatteo, posing as "Sandi," asked Mr. Martin to send a pair of panties as a present. [80a, 173a] "Sandi" also asked him, "Are you going to kiss me all over...even on my cutchie?" [82a-83a]. Also during this dialogue, "Sandi" asked Mr. Martin to send her some pornographic pictures and movies. [173a-176a].

On September 24, 1998, "Sandi" repeated her request for pornographic pictures and videos, and she told Mr. Martin that she wanted to have fun with him. [90a, 174a].

On September 27, 1998, Mr. Martin communicated that he had purchased a necklace with a unicorn pendant for "Sandi." [91a]. On September 29, 1998, he sent photographs of himself at a wedding and on the golf course, which DiMatteo later used to identify him. [92a, 95a]. DiMatteo received the necklace in the mail on September 30, 1998. [109a-111a].

On September 29, 1998, an agent for DiMatteo named Sheila Bayles posed as "Sandi" on the telephone, with the assistance of a voice altering device. [97a-100a]. During that conversation, "Sandi" told Mr. Martin she wanted him to warm her up, and she asked if he intended to use a condom, clarifying that he did not need to do so when "I suck your dick." [175a-176a]. "Sandi" also asked for some crotchless panties, asked Mr. Martin if he wanted to take photographs and videotape of their sex act, and asked him to send a sexy videotape of himself "squirting" on her picture. [177a, 180a]. Officer DiMatteo agreed that this telephone conversation constituted the first dialogue between Mr. Martin and "Sandi" depicting graphic sexual acts. [176a].

In a subsequent email message that same day, Mr. Martin told "Sandi" he had been very aroused by the discussion, and that he would send her a video of himself "doing just what we talked about today." [103a-104a]. Later that same day, "Sandi" asked Mr. Martin once again to send the pictures and the panties. [181a].

On September 30, 1998, Mr. Martin sent to "Sandi" a picture of some nude children. [106a]. DiMatteo agreed that this transmission was made in response to "Sandi's" request. [172a]. On October 3, 1998, DiMatteo, posing as "Mike," told Mr. Martin that "Sandi" asked him every day whether Mr. Martin had sent the videotape. [180a-181a]. On October 4, 1998, "Mike" asked Mr. Martin if his video camera recorded sound. [120a]. On that same date,

"Sandi" asked Mr. Martin why he liked young girls instead of ladies, she again asked Mr. Martin about the panties and the video, and she said she wanted "more !!!" pictures [182a].

On October 6, 1998, "Sandi" repeated her request for panties, pictures and a videotape, and "Mike" reiterated that "Sandi" was "bugging the shit" out of him to check the mail for the video. [184a]. On that same date, Mr. Martin sent seventeen photographs to "Sandi" via an email message. [124a-125a].

DiMatteo, as "Mike," continued to have discussions with Mr. Martin regarding the arrangements for his meeting with "Sandi." [127a-129a]. On October 14, 1998, he told Mr. Martin that "Sandi" asked about the video again, and that she was happy when he told her she would be able to spend the night with Mr. Martin. [185a]. Later that same day, "Mike" told Mr. Martin he hoped the video would soon arrive, because "Sandi" was driving him nuts. [186a].

On October 20, 1998, DiMatteo arranged for Mr. Martin to speak with "Sandi" on the telephone once again. [137a-138a]. During that conversation, Mr. Martin indicated that he had sent the video, and "Sandi" asked Mr. Martin whether he had "squirted all over [her] picture" in the video. She told him that he had enjoyed the panties he sent her. She also told him that, at their meeting, he could take pictures, they could have sex all day, she might "sex [him] to death," and he could do everything to her, and she asked him if he would bring condoms. She asked him if he would make her scream during their sexual activity. [186a-187a]. DiMatteo admitted that "Sandi" brought the conversation back to sex whenever Mr. Martin started to talk about something else. [188a].

On October 21, 1998, DiMatteo received from Mr. Martin a videotape of himself talking to "Sandi" and masturbating and ejaculating on "Sandi's" photograph. [148a].

On October 22, 1998, Officer DiMatteo and Mr. Martin discussed the price for the planned encounter for the first time. [140a]. DiMatteo quoted him the price of $350. [140a]. Mr. Martin would not incur the cost of transporting "Sandi" to Michigan, or the hotel room; these would be paid by "Mike." [190a]. On this same date, DiMatteo told Mr. Martin that "Sandi" had locked herself in a room and watched the videotape he sent her ten times. He again told Mr. Martin to "eat his Wheaties" and get ready for "Sandi." [190a].

On October 23, 1998, Mr. Martin sent to Sandi a series of short movie clips depicting children having sex. [143a]. Officer DiMatteo agreed that these were sent as a result of conversations Mr. Martin had had with him and with Bayles, posing as "Sandi." [145a].

On October 24, 1998, "Sandi" wrote Mr. Martin and said, "Wow, where did you get all the neat-oh movies. I really liked them. I want to do all that stuff. I can't wait to fuck you. Love, Sandi." [147a]

On October 29, 1998, DiMatteo told Mr. Martin that "Sandi" had enjoyed the film clips very much. [192a].

On October 31, 1998, Mr. Martin wrote that he intended to take photographs and videos of "Sandi." [154a-156a]. In that same email conversation, DiMatteo suggested that he also bring a vibrator, a garter and some jewelry to their meeting, and he told Mr. Martin that "Sandi" said she would "sex him to death." [192a].

Mr. Martin's meeting with Sandi was scheduled for November 4, but was rescheduled for November 6. On November 3, 1998, DiMatteo facilitated another telephone call between Mr. Martin, "Mike," and Bayles, posing as "Sandi." [158a]. During that conversation, "Mike" told Mr. Martin that "Sandi" was upset that their meeting was postponed. He also told Mr. Martin

what gifts to buy for "Sandi" and where he should purchase them, and he reminded him to bring garters because "Sandi" was looking forward to donning them. [196a].

DiMatteo met Mr. Martin at a Rochester Hills hotel on November 6, 1998, along with Officer Susan Steinhelper posing as Mike's wife, Valerie, who pretended to bring "Sandi" to an adjoining room to wait for Mr. Martin. [161a]. While they were waiting, DiMatteo told Mr. Martin that "Sandi" was jumping all around when she watched the videotape he sent her, that she was really looking forward to being with him, and that a lot of people do not understand that children enjoy sex as much as adults. He also said that many of the girls he offered as prostitutes saved as much as $20,000 to $30,000, and that some of them attended college. [199a-200a]. Officer Steinhelper asked Mr. Martin if he wanted "Sandi" to swallow after she performed oral sex. [200a]

Mr. Martin gave Officer DiMatteo $350. He also brought with him a bag which contained camera equipment, condoms, a garter belt, panties, stockings and an engraved ID bracelet for "Sandi." [163a-164a] Mr. Martin was arrested at the hotel. [165a]

Over defense objection, the court admitted an undated and unrelated videotape police had seized from Mr. Martin's place of employment, which depicted him masturbating while watching a neighbor child playing. [208a-209a]

The court denied the motion to dismiss due to entrapment, in a written Order issued November 4, 1999.

On December 1, 1999, Mr. Martin pled guilty to four counts of distribution of child sexually abusive material, for sending computer images of erotic child nudity on September 17, 1998, September 18, 1998, October 6, 1998 and October 24, 1998. [14b-15b]. He also pled guilty to attempting to or preparing to produce child sexually abusive activity material. [16b]

He also pled guilty to three counts of solicitation to commit first degree criminal sexual conduct involving three different acts of sexual penetration with a person under age 16.[1] [16b-17b]. The parties and the court agreed that the plea would not waive the defenses of entrapment and impossibility. [18b-19b].

[1] To constitute first degree rather than third degree criminal sexual conduct on these facts and theory, the offense actually must involve a victim under the age of 13, not 16. [See MCL 750.520b & MCL 750.520d].

I. THE COURT OF APPEALS PROPERLY REVERSED MR. MARTIN'S CONVICTIONS FOR SOLICITATION TO COMMIT FIRST DEGREE CRIMINAL SEXUAL CONDUCT, BECAUSE THE BEHAVIOR FOR WHICH HE WAS CONVICTED DOES NOT SATISFY THE STATUTORY DEFINITION OF THAT OFFENSE.

Standard of Review. Questions of statutory interpretation are reviewed de novo. *Cox v Board of Hospital Managers for the City of Flint*, 467 Mich 1; 651 NW2d 356 (2002).

In pertinent part, Defendant-Appellee Dean Madison Martin was charged with soliciting "another person, Sgt. S. Steinhelper and Det. M. Dimatteo, to commit the felony of Criminal Sexual Conduct – First Degree." [22b, 25b]. The solicitation statute punishes "a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony..." MCL 750.157b.

Consistent with the Court of Appeals' opinion below, the factual scenario in the instant case is identical to that in *People v Thousand,* 465 Mich 149; 618 NW2d 772 (2001) insofar as is concerned the behavior of Officer Steinhelper, who, like the officer in *Thousand* who posed as "Bekka," pretended to be "Sandi," the fictitious child with whom Mr. Martin sought to engage in sexual activity. Like in the *Thousand* case, Mr. Martin cannot be guilty of solicitation vis-à-vis Officer Steinhelper, an adult female, because Steinhelper would not have committed a felony even if she had done that which Mr. Martin asked.

Mr. Martin acknowledges that the *Thousand* case did not involve any activity which was analogous to that of Officer DiMatteo, who posed as Mike, the "pimp" who offered to arrange for Mr. Martin to meet the fictitious child. However, by the same rationale as was employed in the *Thousand* case, Mr. Martin cannot be guilty of solicitation with regard to Officer DiMatteo either.

Again, the solicitation statute punishes "a person who solicits another person to commit a felony [here, first degree criminal sexual conduct], or who solicits another person to do or omit to do an act which if completed would constitute a felony [here, first degree criminal sexual conduct.]" MCL 750.157b. In pertinent part, the criminal sexual conduct statute provides that, "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if...[t]hat other person is under 13 years of age." MCL 750.520b (1)(a).

Mr. Martin is not guilty of this offense, because he did not solicit DiMatteo to commit the felony criminal sexual conduct, nor did he solicit him to do or omit to do an act which if completed would constitute the felony criminal sexual conduct. Mr. Martin solicited DiMatteo to procure a non existent child with whom Mr. Martin would have sex. DiMatteo could not commit this act because it was impossible to commit it. The circumstances would be no different if Mr. Martin had solicited someone to murder the man in the moon, the Wizard of Oz or Snow White The elements of the offense simply were not met, because the solicited person would not and could not complete the solicited act.

Even apart from the fact that the elements of the offense were not met because the object of Mr. Martin's solicitation did not exist, Mr. Martin cannot be guilty of this offense, because, at most, his behavior consisted of soliciting DiMatteo to act as a aider and abettor to his own commission of criminal sexual conduct, behavior which is not punishable within the strict language of the act. The statute does not make it a crime to solicit another person to be an accomplice, aider or abetter or co-conspirator to a felony, and this meaning cannot be ascribed to the statute in the face of its plain language.

The fundamental and well-established rules of statutory interpretation clearly do not permit the expansive reading of the solicitation statute which would be required to embrace Mr.

Martin's behavior. The purpose of statutory construction is to give effect to the intent of the Legislature. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997); *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995). If a statute is clear, it must be enforced as plainly written. *Denio, supra* at 699. This principle was recently elaborated by this Court in *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) as follows:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute...We give the words of the statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous...Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed -- no further judicial construction is required or permitted, and the statute must be enforced as written." Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. [Citations omitted].

"In examining the plain language of a statute, the maxim...the expression of one thing is the exclusion of another, means that the express mention of one thing in a statute implies the exclusion of other similar things." *Alcona Co v Wolverine Environmental Prod, Inc,* 233 Mich App 238, 247; 590 NW2d 586 (1998). "Courts cannot assume that the Legislature inadvertently omitted from one [portion of a] statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993). A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor,* 232 Mich App 482, 486; 591 NW2d 359 (1998).

Accordingly, this Court very recently in *People v Koonce,* 466 Mich 515, 522-523; 648 NW2d 153 (2002) refused to read into the statute governing the prosecutor's duty to provide assistance with producing res gestae witness an exception where the witness is an accomplice:

> There is no mention in the current statute concerning an exception in the case of "accomplice witnesses" The language of subsection 5 clearly requires the prosecutor (on request) to reasonably assist the defendant in locating and serving process on a witness. Moreover, the statute does not differentiate between accomplice witnesses and other witnesses. Because the language is plain and unambiguous, it is this reading that we give to the statute. Since § 40a(5) does not permit the prosecution to avoid its statutory duty to provide "reasonable assistance" on the basis that the listed witness is an accomplice, it must give "reasonable assistance" without regard to the witness' accomplice status.

On the basis of these principles, the Court of Appeals similarly in *People v Craemer*, ___ Mich App ___; ___ NW2d ___ (August 23, 2002) recently refused to read into the statutory scheme regarding drug forfeiture a requirement that a prevailing claimant thereunder must pay towing and storage fees related to the seized asset. "[T]his Court may not do on its own accord what the Legislature has seen fit not to do." *Craemer, supra,* citing *Stokes v Millen Roofing Co,* 245 Mich App 44, 60; 627 NW2d 16 (2001).

The constitutional underpinnings of this precept of statutory interpretation were very aptly elaborated by Justice (then Judge) Young, in his dissent in *People v McIntire,* 232 Mich App 71; 591 NW2d 231 (1999), which was fully adopted by this Court in *People v McIntire,* 461 Mich 147, 152-153; 599 NW2d 102 (1999):

> Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute...A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation"...When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances of the particular case. *People v McIntire,* 461 Mich 147, 152-153; 599 NW2d 102 (1999)[citations omitted] [emphasis in original].

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> The traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. *People v McIntire, supra* at 153.

In *McIntire,* the Court of Appeals had sought to expand the statutory provision governing witness immunity to require that the witness' testimony be truthful. In so doing, this Court concluded that the Court of Appeals had "abandoned these traditional rules of construction, ignored the plain text of the statute before us, and substituted its own policy preferences for those of our Legislature by finding an unexpressed legislative intent" *McIntire, supra* at 153. The Court found the Court of Appeals had engaged a "herculean, yet ultimately unsuccessful, attempt to create an ambiguity where none exists." *Id.* Notwithstanding this Court's agreement that the Court of Appeals' desired result was a laudable one, indeed "one with which [we] might wholeheartedly agree [if we were legislators] authorized to enact policy," *id,* this Court steadfastly adhered to important rules of statutory construction which are enshrined in our Constitution. The same restraint is mandated in the case at bar.

Consistent with these fundamental tenets of statutory interpretation, Mr. Martin cannot be guilty of soliciting DiMatteo to commit the felony of criminal sexual conduct, because he never asked DiMatteo to engage in behavior, "which if completed would constitute [that] felony." What Mr. Martin asked DiMatteo to do was procure a fictitious child, who existed only in Mr. Martin's wayward imagination, with whom Mr. Martin could have sex. The statute was not violated because

DiMatteo could not do this act, since the child did not exist. And even if DiMatteo could have done the solicited act, he would at most have been an aider and abettor to Mr. Martin, which is not included within the statutory definition of the crime of solicitation.

No matter how abhorrent Mr. Martin's behavior might have been, it did not constitute the crime of solicitation to commit criminal sexual conduct. Accordingly, the Court of Appeals properly reversed Mr. Martin's convictions for that offense, and this Court should not disturb that decision.

SUMMARY AND RELIEF

Defendant-Appellee asks this Honorable Court to affirm the Court of Appeals' decision reversing his convictions.

Respectfully submitted,

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